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May 29, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Cellular Service in the Gulf of Mexico
WT Docket No. 97-112
CC Docket No. 90-6

Dear Ms. Salas:

On behalf of Petroleum Communications, Inc. ("PetroCom") and Bachow/Coastel, L.L.C. ("Coastel"), this letter responds to the March 18, 1998 letter submitted by the "coalition" of cellular land-based licensees concerning matters in the referenced dockets.[1]

In their March 18, 1998 letter, the coalition argued that the Commission has authority under Section 303 of the Communications Act, as amended (the "Act") to "re-draw the market boundaries of land-based carriers to encompass the coastal waters of the Gulf." Coalition letter, p. 2. As discussed herein, the coalition is wrong.

As a threshold matter, the March 18, 1998 letter is based on a wrong premise -- that the Commission should declare coastal areas of the Gulf of Mexico to be "unserved areas" subject to re-licensing. The letter presumes the need for and appropriateness of such re-licensing and proceeds to promote the legality of simply re-licensing these coastal waters as part of the adjacent land-based cellular markets as a preferable alternative to conducting auctions to award new licenses. However, the presumption is incorrect and, therefore, arguments concerning a choice among methods of re-licensing are irrelevant. As the Gulf carriers have repeatedly made clear, any re-licensing, be it by annexation or auction, would be inconsistent with the United States Court of Appeals for the District of

[1] The coalition is comprised of GTE Service Corporation, SBC Corporation, and Vanguard Cellular Systems, Inc. d/b/a Western Florida Cellular Telephone Corp.

Columbia Circuit's remand directive in *Petroleum Communications, Inc. v. FCC*,[2] is unfairly skewed in favor the cellular licensees in the land-based markets adjacent to the Gulf, and is ultimately unnecessary to address the Commission's concerns in this matter. As has been their pattern, the coalition does not even mention the *Petroleum Communications* remand order in their March 18 letter. This is because their proposal to take 25-50 miles of Gulf waters from the Gulf of Mexico cellular market and add it to adjacent land-based cellular markets brazenly flaunts the remand directive.

To support their proposition, the coalition relies on a decision of the United States Court of Appeals for the D.C. Circuit, *Committee for Effective Cellular Rules v. Federal Communications Commission*.[3] There are several reasons why the *CECR* case does not support the coalition's proposition.

In *CECR*, the Court upheld the Commission's adoption of rule amendments that changed the method by which cellular carriers calculate their Cellular Geographic Service Areas ("CGSAs"). Under the new method, a carrier's CGSA is determined by its 32 dBu contours rather than 39 dBu contours. Parties opposed to this change argued that the Commission had impermissibly modified individual licenses through rulemaking in violation of the adjudicatory procedures set forth in Section 309 of the Act. The Court rejected this argument, holding that the Commission "properly acted within its rulemaking authority when it amended the technical standards for determining reliable cellular service...a change which resulted in the redefinition of the CGSAs of all existing cellular licensees."[4] The Court thus rejected arguments that the Commission's action had "established the licensee itself by rule."[5] The Court found "no individual action here masquerading as a general rule."[6]

Inasmuch as the coalition argues that the Commission has Section 303 rulemaking authority to re-draw market boundaries of land-based licensees to include Gulf coastal waters -- in effect, to take away a portion of the Gulf carriers' markets and assign Coastal

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[2] *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994) [hereinafter "*Petroleum Communications*"].

[3] *Committee for Effective Cellular Rules v. Federal Communications Commission*, 53 F.3d 1309 (D.C. Cir. 1995) [hereinafter "*CECR*"].

[4] 53 F.3d at 1316.

[5] *Id.* at 1319.

[6] *Id.* at 1320 (citing American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 24 (D.C. Cir. 1966)).

Zone licenses to the land carriers -- its reliance on *CECR* is misplaced. *CECR* involved a revision to the technical specifications for *all* cellular licensees. Here, the coalition proposal would revise the rules in a manner that would single out only the two Gulf cellular licensees for reduction of their licensed CGSAs. Thus, unlike the amended technical rule considered in *CECR*, which increased the CGSA of all licensees, the rule change advocated by the coalition would enlarge the market boundaries of a small class of individual licensees -- land carriers adjacent to the Gulf -- to the detriment of an even smaller class -- the Gulf carriers. The coalition's proposed rule change is not one of general applicability which the Commission has authority to adopt through rulemaking, but rather one whereby the Commission would establish the licensees in the Coastal Zone, something it lacks the authority to do under Section 303 of the Act.

Moreover, the central complaint of petitioners in *CECR* was that in changing from a 39 dBu contour to a 32 dBu contour, the Commission had "enlarged" the licensed areas of all existing cellular licensees and reduced the "unserved areas" that were to be made available for future licensing. Thus, not only was the service area "enlargement" applicable to all existing cellular licensees but no *licensee* was adversely affected by the Commission's action. In this situation, the coalition proposal would enlarge the cellular markets of a select group of land-based cellular carriers (those adjacent to the Gulf of Mexico), thereby adversely affecting two existing cellular licensees by reducing their licensed CGSAs. The ability of the Commission to consider industry characteristics as a basis for rulemaking action does not translate into authority to use the characteristics of a single market to unilaterally reduce the licensed service area of the licensees in that market through rulemaking action. Indeed, the opposite is true. It was the D.C. Circuit's concern that, in attempting to freeze the Gulf carriers' licensed service areas in place through a rulemaking proceeding, the Commission had failed to consider the effect of the unique characteristics of the Gulf of Mexico cellular market on the ability of the Gulf carriers to serve their licensed markets that led to the remand directive.

As *CECR* makes clear, the Commission cannot avoid adjudicatory procedures for granting and modifying individual licenses.[7] In the cellular service, those procedures require the processing of unserved area applications after expiration of "fill-in" periods of existing licensees.[8] The Commission certainly could modify such procedures by redefining "fill-in" periods and establishing dates and procedures for filing unserved area applications which, under current law, are subject to competitive bidding.[9] The Commission could also make rule changes that diminish the unserved area available to competing applicants, as

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[7] *Id.* at 1318.

[8] 47 C.F.R. § 22.949(1995).

[9] 53 F.3d at 1318; 47 C.F.R. §§ 1.2101-.2111(1995).

in *CECR*.[10] Such rule changes, however, are in stark contrast to the coalition's proposal that the Commission reduce the licensed area of Gulf carriers and outright establish the land carriers as Coastal Zone licensees without any competition whatsoever.

On March 2, 1998, the Gulf carriers jointly submitted proposed rules for the staff's consideration. Under the Gulf carriers' proposal, the Commission would: (1) graphically depict market boundaries; (2) maintain the definition of protected CGSAs applicable to land and Gulf carriers while permitting each to operate at a power that generates the same 32 dBu signal strength at those boundaries; and (3) give land and Gulf carriers equal and reciprocal collocation rights coupled with fill-in period extensions. Unlike the coalition's proposal, the Gulf carriers' proposal satisfies the *CECR* criteria for permissible rulemaking. First, the Gulf carriers are not asking the Commission to "re-draw" market boundaries, but only to depict the "coastline" boundary graphically. Second, the Gulf carriers propose no change to CGSA definitions at all, but rather a rule amendment to allow land and Gulf carriers to transmit with equal field strengths at the depicted boundary -- the fairest and most straightforward solution to the "capture interference" problem claimed by both sides. Third, the collocation rights, like the other rule amendments proposed by the Gulf carriers, are of general applicability to all cellular carriers because they are equal and reciprocal among both the land-based and Gulf licensees.

The coalition's wish simply to be given Coastal Zone licenses cannot, and should not, be granted. Aside from asking the Commission to go beyond the bounds of its rulemaking authority, the land carriers have presented no valid evidence that the "capture interference" they allege justifies such a draconian solution. The field test data submitted by the Gulf carriers on January 21, 1998 actually shows the land carriers capturing Gulf carrier traffic, not vice versa. Assuming for the sake of argument that both the land and Gulf carriers might be right, i.e., depending on location and other factors either may capture the other's traffic, the best solution is for the Commission to amend its rules to graphically depict the coastline boundary and permit both types of carriers to operate at equal 32 dBu field strengths at that boundary. Furthermore, reciprocal collocation rules of general applicability are the best way of expanding cellular service to the public along the Gulf, thus minimizing any future need to process unserved area applications. As PetroCom has demonstrated at several land sites along the coast, collocation with land-based licensees works well and serves the public interest. It should be mandated by the Commission as set forth in the Gulf carriers' March 2 joint proposal.

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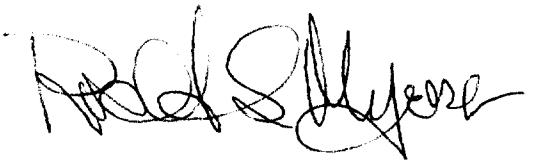
[10] 53 F.3d at 1319.

Respectfully submitted,



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